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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL VITO CLARK, Defendant and Appellant.	C058863 (Super. Ct. No. 080248)

At around 11:00 p.m. on January 7, 2008, Elvin Tasby, an asset preservation specialist at a West Sacramento Walmart, spotted defendant Daniel Vito Clark and his wife, Katherine Bjerkness, in the store. Tasby saw defendant select items, look at a receipt in his hand, and place the items in a shopping cart. Bjerkness later took the items from the shopping cart and put them in a Walmart shopping bag. Tasby suspected defendant of "receipt shopping"—going around the store and selecting items from an old receipt with the intention of later returning them for cash.

Defendant and Bjerkness were stopped by Tasby when they tried to leave the building. Bjerkness was detained, but defendant evaded detention and exited the store. Most of the

events were captured on a surveillance video and shown to the jury.

When police found defendant about two hours later, he had a fluorescent lightbulb carried by Walmart concealed in his pants leg. Including tax, the total price of the items taken was $117.37.

A jury convicted defendant of second degree burglary (Pen. Code, § 459; all further statutory references are to the Penal Code unless otherwise indicated) and sustained a strike allegation. The court sentenced defendant to six years in prison (the upper term of three years, doubled for the prior strike), imposed various fines and fees, and awarded 181 days' presentence custody credit (121 actual days and 60 conduct days).

Defendant appeals.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. Defendant has filed a supplemental brief raising numerous issues.

Defendant attacks his prior strike conviction. He claims there is inadequate evidence he knowingly and intelligently waived his rights when entering the no contest plea in his prior conviction because the judge did not sign the undated change of

plea form. The change of plea form for defendant's prior strike was signed by defendant and his attorney and dated next to each of their signatures. In addition, defendant initialed each of the rights he was waiving by pleading no contest. This written waiver establishes defendant made a knowing and intelligent waiver of his rights. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175; *People v. Panizzon* (1996) 13 Cal.4th 68, 83.)

Defendant also claims it was prejudicial and violated due process to admit the complaint for the prior conviction in the trial on his strike. Defendant did not object in the trial court to the admission of the complaint, which forfeits the claim on appeal. (Evid. Code, § 353, subd. (a); *People v. Partida* (2005) 37 Cal.4th 428, 433-434, 437-438.)

Defendant also points out that the date of his booking photograph is not the same as the date of the offenses alleged in the information for the prior conviction. This does not allege any error.

The next contention is that the court violated section 1164 and the "ethics of improper separation" by allowing the alternate juror to leave before the bifurcated trial on the strike prior. The court allowed the alternate juror to leave the courthouse before the bifurcated trial on the strike began, stating: ". . . you are still an alternate juror and are bound by my earlier instructions about your conduct." The court then admonished the alternate not to talk about the case with anyone, not to have contact with the deliberating jurors, and not to form or express opinions about the issues or decide how he would

vote if he were deliberating. Subsequently, one of the jurors was dismissed during deliberations on the strike trial. The court then called the alternate juror and, over defendant's objection, held a new trial on the strike allegation with a jury composed of the alternate and the remaining jurors.

We presume the alternate juror followed the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Since the alternate was not discharged, the court did not discharge the jury before the verdict, which would have been in violation of section 1164. While the court violated section 1089 by allowing the alternate juror to be absent while the jury heard the first trial on the strike allegation, it cured the error by conducting a second trial on the strike and instructing the jury to disregard the evidence and deliberations in the first trial on the strike. We conclude the error was harmless under any standard.

Defendant argues the court failed to use the appropriate language in imposing the one-strike term. There is no particular formula a court must recite before pronouncing sentence. During sentencing, the court said it was denying defendant's motion to dismiss the strike and doubling the upper term on the basis of the strike finding. Nothing more is necessary.

Defendant's next claim, that his six-year term "is not affected by any limitation on credits," is wrong. The "three strikes" law explicitly limits postsentence credits. (§ 667.5, subd. (c)(5); *In re Young* (2004) 32 Cal.4th 900, 906.) The

strike finding does not limit pretrial custody credits. (See *In re Young*, at p. 906.) The court did not limit those credits.

Defendant also contends there is a discrepancy between the abstract of judgment and the sentence as pronounced by the court. While he has not identified any discrepancy, we have. The abstract indicates defendant was convicted by a plea when he was, in fact, convicted by a jury. We shall order the abstract corrected.

Finally, defendant claims his sentence was arbitrary as the crime resulted in no property loss, injuries, or threats of violence; the amount of the thefts was less than $120; and the codefendant, his wife, was sentenced to only 210 days in jail.

In addition to a strike prior for first degree burglary in 2001, defendant has two other prior felonies and numerous misdemeanor convictions. The court imposed the upper term and denied the motion to dismiss the strike on the basis of defendant's lengthy criminal record. This is amply supported by the record and is not an abuse of discretion.

In a second supplemental brief, defendant claims defense counsel was ineffective by failing to obtain Tasby's criminal record. While testifying, Tasby admitted having a prior felony conviction. As counsel was not deficient, we reject the claim. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692 [80 L.Ed.2d 674, 693, 696].) Defendant also asserts, with no additional argument or authority: "Is the sentence that I received consistent with p.c. section 1170.3" and "Judge makes no verbal order limiting credits. [D]o I have a constituisional

[*sic*] right to be informed of every aspect of my sentence." By raising them in a perfunctory fashion, with no supporting analysis or authority, defendant forfeits these claims on appeal. (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.) His claim that his upper-term sentence is invalid because the court used the term "record" rather than "priors" is without merit, as there is no special language the court must use when explaining the decision to impose an upper term. Defendant also attacks the separation of the alternate juror from the rest of the jury during deliberations on the strike allegations, an issue we have already addressed.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment showing defendant was convicted by a jury of second degree burglary (§ 459) and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

RAYE, J.

We concur:

SCOTLAND, P. J.

HULL, J.